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No. 87-833

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHAD S. HAGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether petitioner was entitled to pursue discovery on his claim that the government selectively or vindictively refused to dismiss the pending charges against him.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-18a) is reported at 25 M.J. 78. The opinion of the Army Court of Military Review (Pet. App. 19a-25a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 25, 1987. The petition for a writ of certiorari was filed on November 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Benning in Georgia. He was convicted of larceny, the wrongful sale of military property, conspiracy, and the attempted sale of military property, in violation of Articles 80, 81, 108, and

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121 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 881, 908, and 921. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 19a-25a). Upon discretionary review, the Court of Military Appeals affirmed (Pet. App. 1a-18a).

1. On four occasions in 1982, petitioner, an Army master sergeant with 18 years of service, sold 38 explosive hand grenades he had stolen at Fort Benning to undercover agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) (Pet. App. 3a; Tr. 197-198; GX 2). Petitioner, who believed that the ATF agents were connected with the Mafia, had told one of the undercover agents that he was in charge of a weapons range at Fort Benning and that he could provide them not only with explosives, but also with firearms and ammunition (Tr. 181, 200; GX 18).[1] Petitioner confessed that he stole about 75 practice "inert" hand grenades and other military items from the government (GX 18). In collaboration with Lieutenant Scott Johnston, petitioner converted the stolen grenades into live explosives (*ibid.*). Petitioner was arrested on July 14, 1982, while attempting a fifth sale (Pet. App. 3a; Tr. 197-198).

2. The convening authority was Major General Wetzel.[2] On August 18, 1982, General Wetzel, in accord-

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[1] Petitioner also transferred more than 4500 rounds of small caliber ammunition to an ATF agent (Tr. 175, 177, 178, 180, 183), a matter for which he was not prosecuted.

[2] A "convening authority" is a commander who is authorized to convene a court-martial pursuant to Articles 22-24 of the UCMJ, 10 U.S.C. (& Supp. IV) 822-824, and Rule for Courts-Martial 504, *Manual for Courts-Martial, United States—1984* [hereinafter *Manual*]. The duties of the convening authority include the selection and appointment of court-martial panel members (a practice commonly known as "detailing" members of a court-martial), directing that the accused be tried by the court-martial for the charged offenses (a practice commonly known as the "referral" of charges to a court-martial), and a post-trial review of the proceedings. See Arts. 25, 34,

ance with the advice of his staff judge advocate, referred the charges against petitioner for trial (Pet. App. 5a). Subsequently, the defense requested that a medical board be convened to evaluate petitioner's mental condition; the government concurred and the trial judge ordered the inquiry (*ibid.*; AX 1). On November 4, Dr. Gerson Escondo, the government psychiatrist who conducted the inquiry, reported that "at the time of [the] alleged offense, as a result of post-traumatic stress disorder, [petitioner] might lack the capacity to appreciate the criminality of his conduct * * * [and] might lack the capacity to conform his conduct to the requirement of the law" (AX 2). Dr. Escondo concluded, however, that petitioner was competent to stand trial (*ibid.*; Pet. App. 5a).

Lieutenant Johnston was also apprehended and charged with conspiracy, larceny, conduct unbecoming an officer and a gentleman, unlawfully possessing hand grenades, and unlawfully making destructive devices, in violation of Articles 81, 121, 133, and 134, UCMJ, 10 U.S.C. 881, 921, 933, and 934 (AX 30). On October 22, 1982, Lieutenant Johnston submitted a request to resign "for the good of the service." See Dep't of the Army Reg. 635-120, "Personnel Separations, Officer Resignations and Discharges," ch. 5 (Aug. 1, 1982); Pet. App. 31a. On November 24, General Wetzel's legal advisor, the acting staff judge advocate, advised General Wetzel to recommend approval of Lieutenant Johnston's resignation request (Pet. App. 31a).[3] The legal advisor noted that petitioner was

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and 60, UCMJ, 10 U.S.C. (& Supp. IV) 825, 834, and 860; see also Rules for Courts-Martial 503, 601, and 1107, *Manual*.

[3] When an officer submits a request to resign for the good of the service after charges have been brought against him, the convening authority must forward the request and his recommendation to the Department of the Army. The Secretary of the Army must thereafter approve the resignation request. Dep't of the Army Reg. 635-120, paras. 1-3(b), 2-3, 5-2 (Aug. 1, 1982).

the "main witness" in the case against Lieutenant Johnston and that, since petitioner's credibility could be severely affected by the sanity board's findings, the prosecution of Lieutenant Johnston could result in an acquittal. The legal advisor also observed that the delays resulting from the psychiatric evaluations in petitioner's case might prejudice Lieutenant Johnston's right to a speedy trial (*ibid.*). Lieutenant Johnston's chain-of-command also recommended that his resignation request be approved (*ibid.*). General Wetzel recommended that the Secretary of the Army grant the resignation request.[4]

Before trial, petitioner sought an additional psychiatric evaluation of his mental status (Pet. App. 6a; AXs 5, 8). Prior to the first session of petitioner's court-martial, the defense requested an examination by a specialist in the field of "Viet Nam Delayed Stress Syndrome," allegedly a type of post-traumatic stress disorder (AX 8). The government offered the services of another government psychiatrist who was not an expert in the area of post-traumatic stress disorder, because the government psychiatrists had concluded that there was no such area of psychiatric expertise (Tr. 17-19). The government indicated that it would comply with a court-ordered psychiatric examination, and the government offered to submit petitioner to a full examination to be conducted by the Chief of Psychiatry at the Fort Benning hospital (Tr. 19). The trial judge ruled that the government was not required to find an additional psychiatrist for the defense (Tr. 22), and the defense declined the government's offer (Pet. App. 6a-7a; Tr. 23).

Before the second session of the court-martial, petitioner requested that General Wetzel authorize the employment at the government's expense of Dr. Dave

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[4] After his resignation from the Army, Lieutenant Johnston was prosecuted and convicted in federal district court (Pet. App. 6a n.4).

Davis, a psychiatrist who met petitioner's criteria. The cost of employing Dr. Davis was estimated to be $4,000 (AX 5). General Wetzel declined. Petitioner renewed his request to appoint Dr. Davis at the second session of the court-martial on December 15, 1982 (Tr. 26). The trial judge denied the request and ruled that the convening authority had not abused his discretion in not making petitioner's chosen psychiatrist available (Pet. App. 7a; Tr. 36).

The next court-martial session was not held until March 28, 1983 (Pet. App. 7a; Tr. 39). Defense counsel informed the trial judge that, during the interim, petitioner had raised $1,000 towards Dr. Davis's fee and had been examined by Dr. Davis (Tr. 39-41). The defense did not renew its motion for the appointment of Dr. Davis (*ibid.*). On March 31, Dr. Davis rendered a written opinion that petitioner lacked the substantial capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law at the time of the charged offenses (Pet. App. 7a; AX 8).

On April 21, General Wetzel's acting legal advisor told General Wetzel about Dr. Davis's opinion and recommended that the charges against petitioner be withdrawn (Pet. App. 26a). The legal advisor's recommendation was based on "a prosecutorial evaluation of the strength of the evidence (*i.e.*, of [petitioner's] sanity) and the projected costs" of further prosecution (*id.* at 7a). General Wetzel, however, declined to withdraw the charges (*ibid.*).

On April 27, relying on the advice of the acting staff judge advocate, General Wetzel denied petitioner's second request that the government pay Dr. Davis's fee (AXs 6, 7). At the next session of the court-martial, however, the government conceded that Dr. Davis had become an essential witness, and the government therefore did not object to producing him (Tr. 54). Nonetheless, the government did not agree that it should have to produce Dr. Davis at the rate arranged by petitioner (*ibid.*). The

trial judge did not specifically resolve the fee issue but ordered the government to produce Dr. Davis on penalty of abatement of the court-martial (Tr. 67). On June 20, the government informed the trial judge that Dr. Davis would testify (Tr. 93-94).[5]

3. On July 26, 1983, eleven months after the charges had been filed, the defense moved to dismiss the charges on the grounds of prosecutorial misconduct and vindictiveness (AX 29; Tr. 137-138). Petitioner requested that General Wetzel and David Rittenhouse (formerly Captain Rittenhouse) be ordered to appear as witnesses on the motion (Tr. 137-138, 151-152).[6] The trial judge denied petitioner's motion to produce the witnesses and denied his motion to dismiss the charges (Tr. 151-154).

4. The Court of Military Appeals affirmed (Pet. App. 1a-18a). It upheld the trial court's conclusion that peti-

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[5] As it turned out, the defense rested without calling any witnesses (Tr. 342). At the sentencing hearing, however, petitioner presented Dr. Davis's testimony by way of stipulation (Tr. 384-388), and he presented live testimony from Dr. Escondo, the government psychiatrist who had first examined him (Tr. 392). After continued treatment of petitioner, Dr. Escondo came to share Dr. Davis's conclusion that petitioner suffered from post-traumatic stress disorder (Tr. 84) and he so testified (Pet. App. 8a; Tr. 393-394).

[6] The grounds for that motion (see AX 29) were that (1) General Wetzel permitted Lieutenant Johnston to resign, while requiring petitioner to stand trial; (2) General Wetzel declined to follow the advice of his staff judge advocate to dismiss the charges against petitioner; (3) General Wetzel refused to authorize the employment of Dr. Davis at the government's expense; (4) General Wetzel refused to meet with defense counsel; (5) General Wetzel selected the court-martial panel to hear the case against petitioner; (6) General Wetzel allegedly engaged in unlawful command influence by stating to subordinates that petitioner's prosecution would go forward. For purposes of the motion, the judge assumed the facts alleged by petitioner to be true (Tr. 153, 154).

tioner had failed to provide sufficient evidence to justify requiring the convening authority to defend his decision not to withdraw the charges against petitioner. The court also ruled that the record failed to show that the convening authority was vindictive or selective in his decisions in this case.

ARGUMENT

Petitioner contends that he should have been allowed to pursue discovery on the question why the charges against him were not withdrawn. Petitioner contends that he was the victim of selective prosecution, since the convening authority preferred charges against him but not against Lieutenant Johnston, who was allowed to resign. Petitioner also claims that the convening authority decided not to withdraw the charges against him in retaliation for his request to have Dr. Davis appointed as a defense psychiatrist. The Court of Military Appeals correctly found that petitioner did not make a sufficient showing to require the convening authority to explain why he declined to withdraw the charges against petitioner.

1. Petitioner contends that the Court should grant review to resolve an alleged conflict among the circuits regarding the standard of proof necessary before a defendant may pursue discovery on a claim of selective prosecution.[7] Petitioner maintains that the court below adopted

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[7] Petitioner also claims (Pet. 12-14) that the trial judge's refusal to order General Wetzel to testify violated the Compulsory Process Clause. Petitioner did not rely on the Compulsory Process Clause at trial, however (AX 29; Tr. 137-151). He has therefore waived that claim. In any event, the Compulsory Process Clause has nothing to do with the correctness of an order denying a request for discovery. The denial of a request to introduce irrelevant evidence does not violate the Compulsory Process Clause (*United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)); *a fortiori*, the denial of a request to conduct discovery or to call a witness to testify before the court on a legal ques-

an unduly stringent standard in reviewing his pretrial discovery request. That claim does not warrant review by this Court, for several reasons.

First, although the courts of appeals have used different verbal formulations of the standard for determining whether a defendant is entitled to pursue discovery or to have a hearing on a claim of selective prosecution, any difference among these standards is entirely semantic, and the standard applied by the Court of Military Appeals is essentially the same as the one applied by all the federal courts of appeals. The Court of Military Appeals employed the standard enunciated in *United States* v. *Falk*, 479 F.2d 616 (7th Cir. 1973) (en banc), which requires the defendant to present " 'facts sufficient to raise a reasonable doubt about the prosecutor's purpose' " (Pet. App. 13a, quoting *United States* v. *Falk*, 479 F.2d at 620-621). The "reasonable doubt" standard is essentially the same as the test applied by other courts, which have characterized the standard as requiring the defendant to show a "colorable" basis for his claim (see *United States* v. *Gordon*, 817 F.2d 1538, 1540 (11th Cir. 1987); *United States* v. *Murdock*, 548 F.2d 599, 600 (5th Cir. 1977); *United States* v. *Berrigan*, 482 F.2d 171, 181 (3d Cir. 1973)); or "some evidence" to support the claim (see *United States* v. *Schmucker*, 815 F.2d 413, 418 (6th Cir. 1987); *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974)); or to make a nonfrivolous showing (see *United States* v. *Hazel*, 696 F.2d 473, 475 (6th Cir. 1983); *United States* v. *Erne*, 576 F.2d 212, 216 (9th Cir. 1978)). In fact, several of the courts have cited these formulations interchangeably, clearly indicating that they do not describe substantively different tests. See *United States* v. *Gordon*, 817 F.2d at 1540 (citation omitted) (describing a "colorable entitlement" for a selective prosecution claim as

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tion does not violate the Compulsory Process Clause if the defendant has not laid a sufficient foundation to justify presenting the evidence.

"sufficient facts 'to take the question past the frivolous state and raise a reasonable doubt as to the prosecutor's purpose' "); *United States* v. *Cammisano*, 546 F.2d 238, 241 (8th Cir. 1976) (citing both *Berrios* and *Berrigan*). The difference in the formulations used by the different courts of appeals therefore does not reflect a difference in standards that warrants resolution by the Court.

In any event, petitioner has failed to show that this case would be decided differently under any circuit's rule. Petitioner's selective prosecution claim hinges on the allegedly disparate treatment received by his confederate, Lieutenant Johnston. Petitioner contends that Lieutenant Johnston was treated favorably by being allowed to resign, whereas petitioner was forced to stand trial for the same offenses. The short answer to petitioner's claim, however, is that unlike Lieutenant Johnston, petitioner never sought to resign even though he could have done so. Army regulations establish a procedure under which petitioner could also have requested a discharge for the good of the Army. Dep't of the Army Reg. 635-200, "Personnel Separations, Enlisted Personnel," ch. 10 (Oct. 1, 1982). That regulation is the functional equivalent of the regulation under which Lieutenant Johnston sought and received approval to resign. It provides that enlisted personnel charged with a crime punishable by a punitive discharge may request a discharge in lieu of a court-martial. Petitioner never made such a request, however, perhaps because a discharge for the good of the service may result in the loss of all military benefits. Petitioner cannot claim that he was selectively prosecuted when he could have sought the same treatment that was afforded his confederate, but did not do so. Since petitioner was responsible for any difference in the treatment he received, he cannot claim to be the victim of selective prosecution.

In addition, the facts on which petitioner relies to support his claim that he was treated unfairly (Pet. 9-10 n.6)

do not amount to a "colorable" claim that petitioner was the victim of selective or vindictive prosecution. First, petitioner claims that Captain Rittenhouse was implicated in the same crimes that formed the basis for the charges against petitioner, since Rittenhouse allegedly furnished Johnston with an automatic weapon that was later sold to the ATF agents (see Tr. 144). Rittenhouse was allowed to resign, petitioner claims, once the Army discovered that Rittenhouse had previously been an aide to and close friend of the convening authority. The Court of Military Appeals, however, found, that nothing in the record supported the suggestion that Rittenhouse was involved in any misconduct (Pet. App. 3a n.3). The Court of Military Appeals also found that, in statements made by petitioner but not admitted at trial, petitioner "himself provided the refutation of Rittenhouse's criminality" (*id.* at 10a) by suggesting that Rittenhouse merely sold petitioner a legal weapon and was not a party to petitioner's conversion of the weapon into an illegal, fully automatic weapon, or to petitioner's resale of the weapon to the ATF undercover agents (*id.* at 3a n.3).

Second, petitioner asserts that General Wetzel declined to prosecute Lieutenant Johnston on the ground that petitioner was mentally incompetent to testify, even though the evidence indicated that petitioner was competent. In actuality, the acting staff judge advocate advised the convening authority to approve Johnston's resignation request because of the legal advisor's concern about petitioner's *credibility*, not his *competency* (Pet. App. 31a; AX 30). Moreover, the legal advisor noted that Johnston's speedy trial right was in danger of being prejudiced due to the delays in petitioner's case,[8] and that Johnston's

[8] Petitioner was not brought to trial until eight months after Lieutenant Johnston submitted his resignation request. The government would have been required to bring Johnston to trial within 120 days of the preferral of charges against him. Rule for Courts-Martial 707(a), *Manual*.

chain-of-command had approved his resignation request. The Court of Military Appeals found that "[t]he reasons cited by the acting staff judge advocate * * * speak for themselves and are entirely justifiable" (Pet. App. 10a).

Third, petitioner asserts that the convening authority's decision not to follow the legal advisor's recommendation and withdraw the charges against him is evidence of an intent to retaliate against petitioner for requesting that Dr. Davis be appointed as a defense psychiatrist. The Court of Military Appeals rejected that claim, characterizing it as "patently absurd" (Pet. App. 12a). Petitioner assumes that the convening authority would have withdrawn the charges in the absence of his request for the appointment of Dr. Davis, but there is no basis for that assumption. At the time that General Wetzel's legal advisor recommended that the charges against petitioner be withdrawn because of Dr. Davis's conclusion that petitioner was insane, the convening authority also had substantial contrary evidence that petitioner was sane. The convening authority, therefore, did not act improperly by submitting that issue to an impartial factfinder. Indeed, as the Court of Military Appeals pointed out, the fact that the military judge who sat as the finder of fact found that petitioner was sane suggests that "[a]pparently the general had a better appreciation than did the acting staff judge advocate of just how impressive lay testimony about an accused's behavior can be" (*id.* at 13a). There was also nothing unreasonable about the convening authority's refusal to pay Dr. Davis's requested $4000 fee. Although petitioner had the right to the assistance of a psychiatrist, he did not have the right to select the expert of his choice and demand that the government pay whatever fee that expert charged. See *Ake* v. *Oklahoma*, 470 U.S. 68, 83 (1985). The government had already arranged to have petitioner examined by Dr. Escondo, and in response to petitioner's request for a further examination, the government offered petitioner

two other psychiatrists, including the chief of psychiatry at Fort Gordon, but petitioner declined the offers (Pet. App. 6a-8a).

Finally, petitioner relies on the convening authority's informal remark to some subordinates that the prosecution of petitioner was costly and would go forward. Even assuming that that remark was made (Pet. App. 9a, 11a-12a), it was objectively neutral and betrayed no animosity towards petitioner or his chosen defense. It was merely a statement by General Wetzel that he did not intend to withdraw the charges against petitioner—something that accurately described his actions in the case. To the extent that the statement suggests that the cost of the prosecution was a factor in General Wetzel's decision not to withdraw the charges, that may not have been the most appropriate justification for pursuing the case, but it did not reflect any invidious discrimination against petitioner.

The discovery standard applied by the Court of Military Appeals protects military commanders (and with them, military readiness) against "fishing expeditions" (Pet. App. 13a), while also affording a defendant the opportunity to prove that his prosecution stems from an improper discriminatory motive. Petitioner failed to make a sufficient showing in this case that discovery was necessary, and his fact-bound claim to the contrary does not warrant further review.

2. In discussing his claim of vindictive prosecution, petitioner challenges (Pet. 10-11) the Court of Military Appeals' ruling that a defendant must show that the convening authority acted with a vindictive intent. Petitioner contends that the ruling below conflicts with decisions of this Court and the other courts of appeals. That claim lacks merit. This Court has required a showing of actual vindictiveness when the prosecutor adds new charges before trial. *United States* v. *Goodwin*, 457 U.S. 368

(1982). That rule should also apply to a case like this one, in which the defendant claims that the prosecutor's decision not to withdraw previously filed charges is vindictive. Only when a prosecutor brings greater charges after a final judgment is entered has the Court allowed the defendant to rely on a presumption of vindictiveness. *Thigpen* v. *Roberts*, 468 U.S. 27 (1984); *Blackledge* v. *Perry*, 417 U.S. 21 (1974). That principle has no application to this case.[9] Accordingly, the Court of Military Appeals did not err by requiring petitioner to show actual vindictiveness in the convening authority's decision not to withdraw the charges.

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[9] None of the lower court decisions cited by petitioner hold that the prosecutor's decision not to drop the charges against a defendant is presumptively invalid. *United States* v. *Crocker*, 788 F.2d 802 (1st Cir. 1986), involved the claim that the trial judge punished the defendant for standing trial. In the remaining cases, the prosecutor was alleged to have either brought new charges or increased the severity of charges vindictively. See *Lane* v. *Lord*, 815 F.2d 876 (2d Cir. 1987) (prosecutor filed an additional charge added after mistrial); *United States* v. *Meyer*, 810 F.2d 1242 (D.C. Cir. 1987), petition for cert. pending, No. 87-730 (prosecutor added new charge after defendants, who had been arrested for unlawfully demonstrating, chose to stand trial rather than forfeit collateral); *United States* v. *Oliver*, 787 F.2d 124 (3d Cir. 1986) (federal indictment brought after defendant, who was facing state prosecution, failed to cooperate with state authorities); *United States* v. *Guthrie*, 789 F.2d 356 (5th Cir. 1986) (substantive narcotics charges brought after defendant was acquitted of the charge of engaging in a continuing criminal enterprise involving some of the same conduct); *United States* v. *Andrews*, 633 F.2d 449 (6th Cir. 1980) (en banc) (prosecutor added new charge after bail granted to the defendant), cert. denied, 450 U.S. 927 (1981); *United States* v. *Partyka*, 561 F.2d 118 (8th Cir. 1977), cert. denied, 434 U.S. 1037 (1978) (prosecutor brought a narcotics distribution charge after the defendant's conviction on a drug possession charge was reversed on appeal). None of these cases stands for the proposition that the failure to dismiss properly filed charges constitutes a prima facie showing of vindictiveness entitling the accused to an evidentiary hearing prior to trial, the allegation on which petitioner's argument rests.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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